

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JELICE CATHRINA KOPPA

Claimant

v.

INTERIM HEALTH CARE OF WICHITA

Respondent

and

**KANSAS EMPLOYERS WORKERS
COMPENSATION FUND**

Insurance Carrier

Docket No. 1,056,868

ORDER ON REMAND

This claim is before the Board pursuant to the March 6, 2015, Memorandum Opinion of the Kansas Court of Appeals. This claim was placed on the Board's summary calendar for disposition without oral argument.

APPEARANCES

Randall J. Price, of Wichita, Kansas appears for claimant. Richard S. Fisk and Kevin J. Kruse, of Overland Park, Kansas appear for respondent and insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record, including the Award, the Board's prior Order and the Memorandum Opinion of the Court of Appeals.

ISSUES

The Board's March 19, 2014, Order was appealed by respondent to the Kansas Court of Appeals. The Court concluded the Board's decision should be affirmed in part, reversed in part and remanded to the Board with directions. The Court instructed the Board to recalculate claimant's average weekly wage in compliance with K.S.A. 2010 Supp. 44-511(b)(5).

Respondent contends claimant's average weekly wage should be computed by dividing the total wages claimant earned prior to the accident on April 15, 2011, or \$6,032.89, by the number of weeks claimant worked between December 31, 2010, and April 15, 2011, which respondent computes to be 15.142 weeks. Respondent contends the correct average weekly wage is \$398.42.

Claimant argues there is no accounting for two pay periods shown on the wage statement (periods ending March 25, 2011 and April 1, 2011) and therefore, claimant's total wages earned should be divided by the 13 paychecks shown on the wage statement. Claimant contends the correct average weekly wage is \$444.28.

FINDINGS OF FACT

The Memorandum Opinion states in relevant part:

Koppa's compensation rate must be determined based on her average weekly wage for up to 26 weeks preceding the date of her injury. The record contains substantial competent evidence for 12 weeks of employment preceding the accident, showing Koppa earned different rates of pay depending on the shift she worked and what kind of work she was assigned to do by Interim. The record reflects the Board determined Koppa's average straight-time wage calculation based on her testimony that she was earning \$13.75 per hour at the time of her injury, multiplied by 40 hours per week, plus an overtime calculation. The Board's calculation fails to follow the statutory scheme to calculate Koppa's average weekly wage where Koppa's wages were not fixed. Thus, when we consider our standard of review, the record fails to reflect substantial competent evidence Koppa's average weekly wage should be calculated at a flat rate of \$13.75 per hour 40 hours per week plus overtime. The Board must use the actual wage figures for the previous weeks worked, up to a maximum of 26 weeks, in addition to any overtime, to arrive at the average weekly wage upon which to calculate the amount of Koppa's resulting permanent partial disability.

Given the Board erred in this calculation, we remand for the Board to recalculate Koppa's average weekly wage in compliance with K.S.A. 2010 Supp. 44-511(b)(5).¹

According to the testimony of respondent's human resources manager, Cindy Davis, the two weeks with no entry on the wage statement probably represent weeks claimant worked, but turned in her time slips late, and was accordingly paid later for work she performed during those weeks.²

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-511(b)(5):

¹ *Koppa v. Interim Health Care of Wichita*, No. 111,592, 2014 WL 1340587 (Kansas Court of Appeals unpublished opinion filed March 6, 2015, at 12).

² Davis Depo. at 43-44.

If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. . . . In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.

Although the Court of Appeals found there is substantial competent evidence for 12 weeks of employment preceding the accident, neither party agrees with that finding. Claimant maintains the gross wages should be divided by 13 and respondent argues such wages should be divided by 15.¹⁴²

Claimant commenced employment with respondent on December 21, 2010, which is consistent with the wage statement in evidence.³ Including the two "missing weeks," claimant was employed by respondent for 15 calendar weeks before the injury. The gross amount of wages paid during that period is \$5,529.01. When that dollar amount is divided by 15, the result is an average weekly wage of \$368.60, which yields a compensation rate of \$245.75.

Claimant would have the Board divide the gross wages by the number of paychecks claimant received. But K.S.A. 2010 Supp 44-511(b)(5) requires the gross wages be divided by the number of calendar weeks employed preceding the injury, not the number of paychecks received. Respondent's wage calculation includes .142 weeks, or one day,⁴ in addition to the 15 weeks. The statute requires the use of calendar weeks, not days or fractional weeks.

CONCLUSIONS

Pursuant to K.S.A. 2010 Supp. 44-511(b)(5), claimant's average weekly wage is \$368.60.

³ The parties agree that the wage printout is accurate.

⁴ See K.A.R. 51-7-2. The regulation recognizes a day as .14 of a week.

The Board's Order dated March 19, 2014, is amended as set forth in this Order on Remand. The Award dated September 5, 2013, is modified to the extent it is inconsistent with the Memorandum Opinion of the Kansas Court of Appeals and this Order on Remand.

DECISION

Claimant is entitled to 18 weeks of temporary total disability compensation at the rate of \$245.75 per week or \$4,423.50, followed by 10.14 weeks of permanent partial disability compensation at the rate of \$245.75 per week or \$2,491.91, for a 15 percent functional disability, followed by 313.28 weeks of permanent partial disability compensation at the rate of \$245.75 per week or \$76,988.56 for a 78.5 percent work disability, for a total award of \$83,903.97.

As of July 30, 2015, there would be due and owing to the claimant 18 weeks of temporary total disability compensation at the rate of \$245.75 per week in the sum of \$4,423.50, plus 200.43 weeks of permanent partial disability compensation at the rate of \$245.75 per week in the sum of \$49,255.67 for a total due and owing of \$53,679.17, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$30,224.80 shall be paid at the rate of \$245.75 per week for \$122.99 weeks or until further order of the Director.

WHEREFORE, the Board finds that the Board's Order dated March 19, 2014, is modified as set forth in this Order on Remand and the Memorandum Opinion of the Kansas Court of Appeals.

IT IS SO ORDERED.

Dated this _____ day of July, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

A plain and unambiguous statute should be applied based on its express language and not read in a manner that adds something not contained therein.⁵

K.S.A. 2010 Supp. 44-511(b)(4) states how to calculate a claimant's average weekly wage if the worker's money rate is fixed by the hour *at the time of the accident*. The Court of Appeals apparently determined claimant's money rate was not fixed at the time of her accident because her hourly rate varied between \$9 and \$12.75 for work she performed in the weeks *leading up to her accident*.

Claimant's money rate was fixed by the hour at the time of her accident. Whether it varied at times preceding her accident is legally irrelevant. K.S.A. 2010 Supp. 44-511(b)(5) only applies if claimant's money rate was not fixed by the hour, but it was – claimant was being paid \$13.75 per hour at the time of her accident. Respectfully, K.S.A. 2010 Supp. 44-511(b)(4) should have controlled the calculation of her wage, at least if we are following the plain language of the statute.

BOARD MEMBER

c: Randall J. Price, Attorney for Claimant
randy@randypricelaw.com

Richard S. Fisk, Attorney for Respondent
rfisk@bkwflaw.com

Kevin J. Kruse, Attorney for Respondent
kkruse@bkwflaw.com

Honorable Mark Kolich, Special Administrative Law Judge

⁵ *Redd v. Kansas Truck Ctr.*, 291 Kan. 176, 188, 239 P.3d 66, 79 (2010); *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 608, 214 P.3d 676 (2009).